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Oregon Election.

EFFECT OF A MAJORITY OF VOTES CAST
FOR A CANDIDATE
CONSTITUTIONALLY DISQUALIFIED.

SAN FRANCISCO:

JOSEPH WINTERBURN & Co., PRINTERS AND ELECTROTYPERS.

417 Clay Street, between Sansome and Battery.

1876.

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HON. JAMES K. KELLY,

DEAR SIR:—I have examined the question presented under the Constitution of the United States, and the Constitution and laws of Oregon, as to votes cast for the office of Elector of President, in favor of persons holding office under the general government, with the following result.

1. The Constitution of the United States provides for the appointment of Presidential Electors by the several States. The appointment is to be made in such manner as the State Legislatures may direct, "*But no person holding any office of trust or profit under the United States shall be appointed an Elector.*" The Legislature of Oregon has devolved the appointment of Electors on the people, and declared that those having the highest number of votes, at an election held for the purpose, shall be the Electors for the State. But as that Legislature had neither the intention nor the power to override the Constitution of the United States, this legal provision must be understood to refer to persons competent to be chosen as Electors ; and to enact that the persons, not disqualified, who receive the highest number of votes, shall be deemed to be chosen. So far it seems to me there is no room for doubt.

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2. What then is the effect of votes cast for a Federal officer for the position in question? It seems to me that such votes, which are merely an attempt by individuals to override the Constitution of the United States, are simply void. The persons who have engaged in such unconstitutional attempt have, in effect, thrown away their votes, just as if they had voted for a dead man, or a fictitious person, or voted a blank. Hence the only efficient votes are those cast for persons capable of being chosen; and, of them, the requisite number, highest on the poll, are those appointed.

3. The next question is how and by whom is this disqualifying fact to be ascertained, for it is evident that it must be ascertained, in some official and authoritative manner. To answer this question we must examine the election law of the State of Oregon, to see on whom it has devolved the duty of passing on the legal effect of the votes cast, and pronouncing judgment as to who is chosen.

The mode of canvassing the votes at an election, as regulated by the laws of Oregon, is quite simple. The officers of election in the several precincts certify and return to the County Clerk, the number of votes cast in the several precincts, the names of the persons voted for, and the number of votes cast for each.* The County Clerk calls to his assistance two Justices of the Peace, as official witnesses, and from the various precinct returns filed in his office computes the whole vote of the

* General Laws: Chap. XIV, Tit. II, pp. 570, 571.

County; makes lists of the persons voted for, and the number of votes cast for each, and transmits them to the Secretary of State; and this last named officer, in the presence of the Governor, compiles from the several County returns before him the votes of the whole State.† So far, the work is purely arithmetical, and is confined to subordinate and merely ministerial officers. The Governor is then directed to “grant a certificate of election” to the persons having the highest number of votes, and to “*issue a proclamation declaring the election of such persons.*”‡ It seems to me plain that here is the point at which any disqualification against a person voted for must be alleged and shown. The Governor is not only required to be a witness to the canvassing by the Secretary of State, so as to guard against mistake or malfeasance, but he is to declare officially, as the chief magistrate of the commonwealth, and on its behalf, the *legal result* of the voting. He is to make known in the most formal and solemn manner, by certificate of election, under the great seal and by public proclamation, the names of the persons whom the State has appointed to be her Electors. He can not be called on to certify and proclaim that the State has appointed one whom the Constitution of the United States has forbidden her to appoint, and whom, therefore, in law she has not appointed. His oath of office as Governor expressly forbids him. (See Const. Oregon, Art. XV, Sec. 3.)

† General Laws: Chap. XIV, Tit. III, p. 573.

‡ Id. ib, Sec. 37.

It is for him, therefore, when the arithmetical computations have been completed, to ascertain whether any, of those voted for, are constitutionally disqualified, and, if he finds such to be the fact, to disregard such unconstitutional votes, just as if they had not been cast.

4. This view, the natural and logical result of the constitutional and legal provisions bearing directly on the subject, is confirmed by the absence of any provision whatever, for ascertaining the qualifications of persons voted for as Electors, by any other authority than the Governor; so that in fact, unless the duty in question devolves on him, it cannot be discharged at all. And here it may be laid down, as an axiom, that all inhibitory provisions of the Constitution of the United States are *self-enforcing*, and need no State legislation for that purpose; for, otherwise, it would be in the power of the States, by mere failure to legislate, to nullify or frustrate the fundamental law. Hence it follows that, in the absence of any provision of law in Oregon for ascertaining the disqualification of Electors, such duty devolves by force of the Constitution of the United States on the officer who has to ascertain and promulgate the legal result of the election.

It derives additional confirmation from the provisions of Art. XII of the Constitution of the United States, which directs the Electors of President and Vice President to meet in their respective states, and vote for those officers *by ballot*, and

that the lists transmitted to the seat of government shall contain *only the names of the persons voted for and the number of votes cast for each*. This provision puts it out of the power of the houses of Congress, when they assemble to count the votes, to ascertain for whom a disqualified Elector cast his vote. It is clear therefore that disqualification must be ascertained before the certificate of election is granted, and that the Governor of the State is the person to perform that duty.

5. The course usually pursued in cases of election to the ordinary offices of government, of giving the certificate of election to the person having the highest number of votes, and leaving the title to the office to be tried in the Courts, on a writ of *quo warranto*, is inapplicable to Presidential Electors. In case of ordinary offices, all citizens are eligible, and a question which goes behind the election returns and involves the determination of facts dependent on the testimony of witnesses, as ex.gr., double voting, bribery, intimidation, etc., can only be tried by a court having the power to compel the attendance of witnesses, and the other judicial means of ascertaining truth. Such questions have accordingly been so tried from time immemorial. But where, by the fundamental law, the existence of a particular fact, which all persons are bound to take notice of, constitutes an absolute disqualification against being chosen, there is no power in the State to choose such a person, and every attempt to do it is wholly void—a mere nullity.

Another conclusive reason against a trial by *quo warranto* is that, from the peculiar character of the office, the writ could not possibly afford a remedy. The Electors are chosen within the first eight days of November; thirty days thereafter are allowed by law for transmitting the returns and completing the canvass, by the Secretary of State; yet, on the first Wednesday of December, twenty-nine days after the election, at most, the Electors are to meet, and cast their votes. A few hours, a day or two at most, can elapse between the issuance of the proclamation and certificate of election, and the completion of the only duty to be discharged by the Electors. To say that a provision of the Constitution of the United States is to be set at naught, unless within those few hours an action of *quo warranto* can be commenced and brought to a final determination, is to propose a mere mockery of the fundamental law.

Evidently there not only is no legal mode of trying, judicially, the title to the office of Elector of President, but it is impossible to provide one. No legal proceeding involving judicial determination of such right, by a Court, could possibly be completed between the conclusion of the canvass of the popular vote and the discharge of their single official duty, by the Electors commissioned. Hence no other construction consistent with the supremacy of the Constitution of the United States can be given to the election law of Oregon than that above indicated.

It is objected that the duty of determining, on a given state of the poll, who is entitled to the office, is judicial in its character, and can not be devolved on an executive officer; but this is clearly a mistake. Such determination, like every other which has to be made by an executive officer, before acting, in a contingency contemplated by law, involves the exercise of judgment as to whether the contingency has arisen or not; and such judgment must follow legal rules. In this sense, therefore, it may be said to be *quasi* judicial in character; but it is one of a large class of duties of that character which are constantly devolved on executive officers—sheriffs, clerks, district attorneys, supervisors, heads of executive departments, etc.—and which the courts have uniformly sustained. For a similar case see *Gulick vs. New* (14 Indiana R. 93).

6. I have heard it suggested that the difficulty may be overcome by the disqualified candidate's resigning his Federal office before accepting that of Elector. But there is no warrant for such a supposition.

An election is complete at the moment of closing the polls. Electors have then been chosen. The subsequent canvassing of the votes is merely the ascertainment, by arithmetical computation, of the results of what has been done; votes which were invalid when deposited in the ballot-box cannot be rendered valid by any subsequent act or occurrence. Nor is there any room for the sug-

gestion that a majority of votes being cast for a Federal officer creates a vacancy in the Electoral College. The votes for such an individual are simply void, and the persons casting them have in fact refrained from voting. If a vote for a disqualified person were efficient to create a vacancy in the College, a majority of the voters, by voting for a whole ticket of Federal officers, might deprive the State of its Presidential vote, and nullify the Constitution of the United States.

7. I am aware that there are reported cases wherein it has been held that the casting of a majority of votes for an ineligible candidate does not *necessarily* result in the choice of the person next highest on the poll. It is said in them, that where the votes so cast have been given, *by mistake of law or fact*, the election results in no choice. These adjudications, even if sound, can, for obvious reasons, have no application to votes for Presidential Electors, given in favor of persons constitutionally disqualified from being such; but as they are often quoted and are in conflict with other American decisions, as well as with the current of English authority, it is proper to examine the reasoning by which they are supported. To my mind, it is wholly unsound.

The argument is given in the case of *People ex rel. Furman vs. Clute* (50 N. Y., 451), more *in extenso* than in any other case I have met with, and I therefore proceed to examine that opinion.

Preliminarily, it may be observed that prece-

dents taken from cases of private corporations or municipal bodies, of practically analogous character, can have but little weight in determining a question of political law under our system. In them the right to vote is limited to a small number of privileged persons, and usually exercised *viva voce*, so that how each elector voted, and why he so voted, can be ascertained. With us, suffrage is exercised by secret ballot, and is practically universal. To ascertain by whom, with what amount of knowledge or intelligence, and from what motives, the votes for a particular person were cast, is impossible, even if it be conceded that a secret ballot is legally compatible with such inquiry. Hence, the suggestion that the effect of votes for a particular candidate depends upon whether they were given with or without the knowledge of his ineligibility, or upon whether the voters giving them deliberately intended to throw away their votes, is wholly untenable. When the law gives a secret ballot, surely no court has a right to inquire of any citizen how he voted, or what private intent he had when casting his vote. And as to indulging presumptions with respect to the knowledge or the intent of many thousand persons, where there is no power to compel evidence of the fact itself, from any one of them, it is at variance with every principle of judicial investigation. Yet this is precisely the point on which the decision in *Furman vs. Clute* is made to turn. Judge Folger says (p. 461): "They who, knowing that a person is inel-

igible to office by reason of any disqualification, persistently give their ballots for him, do throw away their votes, and are to be held as not meaning to vote for any one for that office." But what is it to *persistently* give their ballots for a particular candidate? No voter can give more than one ballot, nor that more than once at the same election. Once given, too, it is irrevocable. To *persistently* give their ballots for a particular person, must therefore mean, if it means anything, to give their ballots for him at several successive elections—to repeat the act of voting for him so frequently as to force the Court to conclude, contrary to the natural presumption, stated in another part of the opinion, that they intended to throw away their votes: and the context shows that this was, in fact, the idea in the learned judge's mind. But surely such a theory needs only to be plainly stated to expose its fallacy. It assumes, without any warrant, that disqualification for office is something permanent in its character, and that the particular persons voting for the disqualified candidate at each successive election, are necessarily the same individuals, for otherwise there is no persistence. Both these assumptions are clearly erroneous; for, with rare exceptions, such as in the case of the Presidency of the United States, all disqualifications are with us accidental and temporary in their character (so that their existence at any particular moment raises no presumption of their continuance, or of a belief in their continuance, at a subsequent

time), and there are no means of ascertaining whether the votes given for a particular candidate at any number of successive elections do or do not come from the same voters. The question of *persistence*, therefore, would have to be settled by pure guesswork.

These considerations make it clear that *persistence* in voting for a candidate (on which however the whole strain of the sentence rests) can have no place in determining the question, for the fact of "persistence" is absolutely unascertainable by law, and hence no legal consequences can attach to it. The word "persistently" then must be omitted from the sentence, as inadvertently used, and the proposition will then read thus: "They who knowing that a person is ineligible to office, by reason of any disqualification, give their ballots for him do throw away their votes and are to be held as meaning not to vote for any one for that office." So stated, the proposition is unobjectionable, because it should be understood in connection with the fundamental maxim of all civilized governments, that every man is held to know the law of the land, and to know who are the officers of government. But as the learned Judge does not mean it to be so understood, and in that case even indulges a presumption that a majority of the voters were ignorant both of the law and the fact, we must follow him further.

It may be assumed that the law will not allow the validity of a legal act to depend on facts which

are perfectly capable of proof, but which the Courts have no means of ascertaining; for that would be to lodge with those tribunals the power of determining controversies arbitrarily. Now if there is any one thing which transcends the physical power of a Court of Justice to do (even assuming that it has the legal right to inquire) it is to ascertain how many of the electors who, at a State election, cast their ballots for a particular candidate disqualified by law for the office, did so with knowledge of the disqualifying facts. It is simply a physical impossibility, for it involves the examination of every voter throughout the State, and the ascertainment from him (the only person who can have knowledge of the fact) of what ticket he voted and what the state of his knowledge was at the time he cast his ballot. Fancy for a moment such an inquiry instituted in New York, where at the last election over a million votes were polled. Even with the limited vote of the smallest State it would be a physical impossibility; the offer of such evidence in Court would alone point out to any Judge the absurdity of an inquiry which a lifetime would not suffice to conduct. Yet, if the validity of the vote is to depend on the existence of such knowledge, that knowledge becomes the very fact to be inquired into, and the best and only reliable evidence of it is the testimony of the voter himself. As to determining it on presumptions, while the best evidence of the fact itself is excluded, that is simply to refer it to the arbitrary determination of the Judges.

What possible facts can exist or be shown to guide a Judge in ascribing, by presumption, a particular intent of thousands of voters which intent they have never disclosed and he has no means of discovering? Most of the facts likely to have weight, with one accustomed to the study of political statistics, would in all probability be excluded as incompetent evidence; and indeed all testimony on the subject, except that of each individual as to his own state of mind, must necessarily be of the most unsatisfactory character.

Nor is there any safety in permitting the results of a popular election to be determined by anything else than a count of the votes lawfully cast. Is it not evident that if a Court is at liberty out of the same election returns to spell out two contrary results, dependent upon what, in the absence of all evidence, it shall presume the facts to be, the power of election is taken from the people and is confided to the arbitrary discretion of the Judges?

These and many like considerations, make it, as I think, clear that the amount of knowledge possessed by the voter, and his secret intent in casting his ballot, are matters with which neither Courts nor returning officers have anything to do. The result of the election depends on the votes lawfully cast, and on them alone, and there can be but *one rule* for ascertaining it. The law in such cases deals simply with the act and can know nothing of any intent save what the act itself indicates. Suppose a voter writes on his ballot a

declaration that he intends to throw away his vote; is it for that reason not to be counted in favor of the candidate whose name is inscribed on it? Suppose he heads his ticket with the declaration that it is the regular Democratic ticket, yet the names on it are those of the candidates of the opposite party: are the returning officers, or is a Court, authorized to amend the ballot so as to conform to the intent of the voter? There can be but one answer to these questions; yet in both these cases the amendment would be made conformably to the intent of the voter, *as shown by the ballot itself*. In the case we are considering, the proposition is that the Court may amend, not one, but many thousand ballots, by indulging a legal presumption that more than half the voters in the State were ignorant of what every man, woman and child in the state is bound by law to know. Surely if there is any room for presumption in such a case, it must be a presumption of knowledge, not of ignorance.

"There may be," continues Judge Folger, "a disqualifying fact so patent, or notorious as that knowledge in the elector may be presumed as matter of law." And then he quotes a suggestion of C. J. Denman's that "no one can doubt that if an elector would nominate and vote only for a woman to fill the office of Mayor, or Burgess in Parliament, his vote would be thrown away; then the fact would be notorious, and *every man would be*

"*presumed to know the law upon that fact.*"* But does not this *dictum* imply of necessity a presumption that every voter personally knows the individual for whom he gives his vote, or at least knows *who and what he is*? Otherwise there is nothing but the name to indicate the sex of the candidate, and names often fail to do so. Not to refer to the numerous instances in which our population of Spanish descent use such names as "Jesus Maria,"

*The quotation is from the opinion of C. J. Denman in *Gosling vs. Velez*, 7 Adol & El., N. S., pp. 438-9. The words of the Chief Justice are as follows:

"He is present as an Elector; his presence counts as such to make up the requisite number of Electors, where a certain number is necessary; but he attends only as an Elector, to perform the duty which is cast on him, by the franchise he enjoys as Elector; he can speak only in a particular language; he can do only certain acts; *any other language means nothing; any other act is merely null*; his duty is to assist in making an election. If he dissents from the choice of A, who is qualified, he must say so *by voting for some other, also qualified*; he has no right to employ his franchise merely in preventing an election, and so defeating the object for which he is empowered and bound to attend. And this is a wise and just rule in the law. It is necessary that an election should be duly made and at the lawful time; the electoral meeting is held for that purpose only; and, but for this rule, the interest of the public and the purpose of the meeting might both be defeated by the perverseness or the corruption of electors who may seek some unfair advantage, by postponement. If then the Elector will not oppose the election of A, in the only legal way, he throws away his vote, by directing it where it has no legal force; and in so doing, he voluntarily leaves unopposed, *i.e.*, assents to the voices of the other Electors.

"Where the disqualification depends upon a fact which may be unknown to the elector, he is entitled to notice; for without that the inference of assent could not be fairly drawn, nor would the consequences as to the vote be just. But, *if the disqualification be of a sort, whereof notice is to be presumed, none need expressly be given*: no one can doubt, that if an elector would nominate and vote only for a woman, to fill the office of Mayor, or Burgess in Parliament, his vote would be thrown away; there the fact would be notorious; and every man would be presumed to know the law upon that fact."

"Dolores," "Concepcion," "Buena Ventura," etc., indiscriminately for persons of both sexes, the English-speaking race affords many similar cases. "Preserved Fish" was a prominent citizen of New York, and often ran for office; yet I defy any one to find any indication of sex in his name any more than such names as "Desire," "Truth," "Hope," "Patience," "Thankful," by which New Englanders of both sexes are often called. The names of Brigham Young, Shirley Brooks, Sidney Morgan, Currer Bell, Acton Bell, Boston Corbet, Milton Latham, Leland Stanford, Leslie Coombs, and numerous others well known in literature or politics, might be given equally unindicative of sex.

8. I have dwelt upon the case in 50 New York because in it the learned Judge has given us his reasoning at length, and its fallacy can be shown. The other American cases may be more briefly disposed of. In the State vs. Giles (1 Wis., 112), the opinion of the Court on the point is clearly *gratis dictum*, for the candidate in that case was held to be eligible. No reasoning or authority is given, but merely the opinion of the Judges on a question not involved in the case. In Off vs. Smith (14 Wis., 497), the point was dismissed in three lines, on the assumed authority of State vs. Giles, which, as just shown, was and is no authority at all. The opinion in 38 Maine, 597, does not appear to touch the question; there was no case at bar and no argument; the Governor.

merely consulted the Judges as to his powers, and they advised him.

The opinion of Baldwin, J., in *Saunders vs. Haynes* (13 Cal., 145), proceeds mainly on the authority of these cases. The brief reasoning of the Judge assumes, *as of course*, that the votes for the ineligible candidate were given by a mistake of law or fact; and that, though they cannot be counted in favor of the person for whom they were given, they can be counted against his opponent. The learned Judge in that case having been of counsel for the respondent in *Melony vs. Whitman* (10 Cal., 38), and urged that doctrine in argument, was perhaps influenced, as Judge, by his former views as counsel. He does not explain how a vote can be given *against* any person except by giving it in favor of some one else. Nor does he give any intimation whether the presumption he indulged was of ignorance of the law or of the fact; nor what reasoning led him to such presumption. He merely says: "*If a majority of those voting, by a mistake of law or fact, happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him on the poll should receive the office;*" and on that suggestion alone he disposes of the point. But evidently the question still remains—*Were they so cast by mistake of law or fact?* How is that to be ascertained? Is each individual voter to be called to testify how he voted, and whether when he cast his ballot, he knew of the law declaring the disqualification and of the existence of the

disqualifying fact? Are the intrigues, secret influences and caucus deliberations of local political managers to be examined into in Court, with a view of ascertaining the influences that probably controlled each local vote? How, if the disqualification be declared by the Constitution of the State or the United States? Is the voter to be permitted to allege his ignorance of the provision; or is evidence of the general character and education of the inhabitants of a particular locality to be admitted, as tending to guide a Court in presuming their knowledge or ignorance of the fundamental law? How many elections held in States or districts where a majority of the voters is composed of the lately enfranchised colored population could resist such a test?

The decision in *Saunders vs. Haynes* throws no light on any of these pertinent inquiries. In fact, an examination of that case will show that Haynes' claim to the office was contested and adjudged invalid by reason of the misconduct of the officers conducting the election. Such misconduct was alleged and shown. The effect of the votes cast for Turner, the ineligible candidate, was considered in discussing a demurrer to Haynes's answer, which set up that disqualification as a bar to the action. The Court decided the demurrer well taken; but that was a result which necessarily flowed from the fact that any citizen was authorized to contest the election, and that the canvassing officers had no jurisdiction to decide on the qualification of candidates, but were merely to

return the votes actually cast. Hence, the opinion in that case is not authority, because the point was not necessarily involved.

The other California cases are *Melony vs. Whitman*, *supra*, where Field, C. J., expresses his views on it *obiter* in a dissenting opinion, and *Crawford vs. Dunbar*, recently decided, but now under reconsideration by the same Court.

The English cases quoted in support of the doctrine do not sustain it. A leading one is *Reg. vs. Mayor of Tewksbury* (3 Q. B., 629). In it the Judges conceded that *the voter is bound to know that the candidate held the office which disqualified him*; but as the disqualification was matter, not of statute law, but of *recent judicial decision on a point previously obscure*, they questioned whether the decision had come to the knowledge of the voters, and thought that notice of it should have been brought home to them. (See opinion of Blackburn, J., 3 Q. B., 635 & *seq.*, and of Lush, J., on page 638.) I need scarce advert to the wide difference between a presumption of ignorance of a disqualification resting on a judicial decision a month or two old, and of one established by the Constitution at the foundation of our Government.

The idea that votes cast for a disqualified person, though inefficient to elect him, are yet good as against his opponent, appears at first sight plausible; but it will not bear examination. It assumes two opposing candidates for the place, between whom the choice of the voters is

limited, and that every vote cast for either of them affirms, in judgment of law, two distinct things, viz. First, I am in favor of electing Mr. A to this office; second, I am opposed to electing Mr. B to it. It is only by so construing the ballot that it can be deemed invalid as to the person in whose favor it is cast, yet good as against the other candidate. But I submit confidently that this is an erroneous construction. It is true that in common parlance we speak of voting against a man, but the expression is merely a popular, not a legal one. The law does not invite or permit voting *against* any candidate. It does not know such an act as voting against any man.* It gives each voter the right to vote in favor of whomsoever he prefers; but, save by voting in favor of one who is qualified, there is no legal way in which he can vote against another. Suppose him, if you please, so disgusted with all the nominations made, as to be unwilling to support any of them. Has he a right to inscribe on his ballot a vote in opposition to all or any one of them, and could his vote, if he did so, be counted for any purpose? Surely not; for the question is not taken—Those in favor of Mr. A will vote “aye”; those opposed to him, “no.” If a ballot in favor of one candidate is to be deemed a vote against another, and held efficient in the latter aspect, what becomes of the law that a plurality of votes is sufficient to elect? A has 500 votes; B, 475; and C, 475. Five hundred

* See opinion of C. J. Denman in *Gosling vs. Veley*, cited *ante* in note.

in favor of A, and 950 against him! Yet he is elected, although the majority against him (popularly speaking) is nearly two to one. If the votes of the 950 supporters of B and C could be counted as votes against A, he would be defeated.

In many instances several persons are voted for on the same ticket for the same office (as members of the Legislature, Presidential Electors, etc.), so that no one man can, even in popular language, be said to be running against a particular opponent. How count these supposed negative votes, or votes against an opponent in such a case? Suppose the case of Presidential Electors, six to be chosen and 100,000 the total number of votes cast. Mr. A, a federal officer, disqualified by the Constitution of the United States, is so general a favorite as to be put on all the tickets and receive a unanimous vote, suppose the votes as to the other five to be divided substantially in the proportion of fifty-one and forty-nine per cent. When counted, the ballots turn out as follows:

Mr. A (a Federal officer)..	has 100,000 votes.
Mr. B.	“ 51,000 “
Mr. C.	“ 51,000 “
Mr. D.	“ 51,000 “
Mr. E.	“ 51,000 “
Mr. F.	“ 50,900 “
Mr. G.	“ 49,100 “
Mr. H.	“ 49,000 “
Mr. I.	“ 49,000 “
Mr. K.	“ 49,000 “
Mr. L.	“ 49,000 “

Who are the persons chosen? *Against whom*

are the 100,000 votes cast for Mr. A to be counted? Counted against any one of the other ten, they will defeat him, yet he had no opponent, and so, in common parlance, in voting for him you did not vote against any one. Further illustration may be had by varying the case, and supposing the Federal officer, though on all the tickets, to be scratched by individuals to the extent of three, ten, thirty, forty thousand votes. Whatever way it is put it serves to render more plain the falsity of the doctrine that under our system there is any such thing (legally speaking) as voting against any one.

9. Stress is sometimes laid on the idea that by holding votes for an ineligible candidate to be void, you defeat the popular will; and Judge Baldwin, in *Saunders vs. Haynes*, speaks of the hardship of a man's being elected by a minority of the voters. But this is to lose sight of the rule that the popular will *to be legally efficient must be expressed by legal means*, and that the constitution and the laws allow a minority of all the voters to elect, by declaring a mere plurality to be sufficient for the purpose.

Again, if it be true, that the casting of a majority of the votes for a disqualified person leaves a Court at liberty to declare the next on the poll elected, or to determine that there was no choice, it would seem that the Court should have the power to order a new election, for that would be the natural result of the latter decision. The fact

that no such power is given to courts anywhere, is, therefore, some argument against the position.

On the whole, I am convinced that the safer and more reasonable rule in such cases is that laid down in *Hatcheson vs. Tilden and Borely* (4 H. & McH 279), and in *Gulick vs. New* (14 Indiana, 93). In the latter case, the Court intimated that a distinction might exist between constitutional disqualifications and others, but refrained from any opinion on the point; thus carefully limiting its decision to the case actually before it.

The general current of the English decisions is the same way. See the cases collected in Brightley's contested election cases page 150. It is to be observed here that disqualification for office is so exceptional under our Government that questions arising on it have rarely arisen and been but loosely considered. None of the adjudged cases, that I am aware of, have involved any office of great public importance, or elicited a thorough discussion on principles of political law.

Looked at from that point of view, it will be found that there is an insuperable objection to entertaining any presumption or permitting any evidence, as to knowledge, ignorance or intent on the part of the voter, for the purpose of ascertaining the result of the election. The proposal to do so loses sight of the distinction between civil and political acts. As to the former it is true that an act done in ignorance of material facts, or with intent to do another and different one is voidable

and may be corrected to conform to the intent of the parties. If, intending to execute a deed in favor of A, I sign one in favor of B, a Court can reform the instrument and make it what it was intended to be. If I am induced to make a deed or enter into a contract, by misrepresentations or concealment of material facts, the same power can set aside the instrument and restore me to my former right. If my agent is induced by a bribe or other personal consideration to convey or lease my property, I can repudiate the act and have it annulled. These are cases of civil acts. But with respect to political acts the rule is widely different. If I am induced to vote for a particular candidate, by misrepresentations, no matter how false, as to his fitness for the office and the unfitness of his opponent, or as to the political opinions of either, the act is irrevocable, and the election valid. An act of the legislature procured by direct bribery of the members voting for it, is not the less a valid law, and if it involves a contract, it is irrepealable (*Fletcher vs. Peck*, 6 Cranch; 87). A pardon procured from the Executive by misrepresentation or bribery is nevertheless unimpeachable. These are instances of political acts.

If ignorance, or presumed ignorance, of a particular fact can invalidate a vote or change its character, it is difficult to see why ignorance or misinformation on another fact, equally material in the estimation of the voter, should not have the same effect. If rightly applied where the candidate was an office holder, and the voter unaware of the fact,

why not in other cases? How if he was nominated and supported on the supposition that he was a member of a total abstinence society or of some christian church, and represented to be such by his advocates, yet it afterwards turned out that he was not? And, as the act of voting usually consists in a choice between opposing candidates, what effect on the validity of the vote is to be attributed to misrepresentations of the character or opinions of the opposing candidate? It was charged in the Senate of the United States, and admitted, that in 1844 Polk and Dallas were supported in Pennsylvania distinctly as Protectionists. "Polk and Dallas and the tariff of 1842" were, it was agreed, inscribed on every Polk and Dallas election banner in that State. The majority of votes in Pennsylvania which determined that Presidential election was, if this be true, won by direct misrepresentations as to the political opinions of the opposing candidates. Was any suggestion heard that the election was therefore invalid? It has been alleged that the distribution of Credit Mobilier Stock among members of congress secured the passage of certain Pacific R. R. legislation. If so, the persons accepting such bribes could be punished criminally, but the legislation is not the less valid.

The reason of this distinction between civil and political acts is to be found in the very necessities of Government, which could not be carried on for a day if the validity of the latter class of acts was allowed to depend on any such conditions as may

affect the former. Hence the law presumes absolutely, on the part of every one charged with the performance of any political duty, all the knowledge and mental capacity necessary for its complete and intelligent discharge, and such presumption cannot be rebutted. It is even most necessary in communities of the least instruction and lowest intelligence, for there controversies based on misrepresentations to, imposition on, or misunderstanding by the voters, would be most frequent and least capable of satisfactory solution.

10. But whatever may be the rule as to minor officers, or in the case of disqualifications created by statute, it is certain that it can have no application to a disqualification created by the Constitution of the United States as to any of the high officers of Government. The President of the United States is required to be a native born citizen. Suppose some of the Presidential Electors cast their ballots for Carl Schurz or some other eminent adopted citizen, what becomes of such votes? Can they be counted? Evidently not. So it requires the Electors, in voting for President and Vice President, to select at least one who is not a citizen of the same State with themselves. Suppose the New York Electors, in violation of this provision, should vote, "For President, Samuel J. Tilden; for Vice President, Lucius Robinson"—is the country to be vexed, on this doctrine of presumptive ignorance, with an absurd discussion as to whether they knew that Messrs. Tilden and Robinson were both citizens of New York, or were aware

of the constitutional provision on the subject? At the last presidential election votes were cast in the Electoral College for Horace Greeley, who was dead. No inquiry was made as to the knowledge or intention of the Electors; the votes were simply thrown out, and not counted in any way.

Presidential Electors are chosen a very brief time before they are to exercise the single duty of their office by voting for President and Vice President. There is no time to hold a second election if the first one fails, nor any even to submit to a court the question of what presumption shall be entertained as to how many of the voters whose ballots were cast for a disqualified person knew the disqualifying fact, and therefore intended to throw away their votes. There is therefore no room for presumption upon the subject, and the conclusion is inevitable that votes cast for the office in favor of a person disqualified by the Constitution are thrown away, and that the next highest candidate who is eligible is elected.

Yours respectfully,

JOHN T. DOYLE.

San Francisco, Dec. 1st, 1876.

The undersigned concur in the foregoing opinion.

San Francisco, December 2d, 1876.

DELOS LAKE,	EUGENE CASSERLY,
JOHN S. HAGER,	JOHN R. JARBOE,
EDMUND L. GOOLD,	HARRY I. THORNTON,
PHILIP G. GALPIN,	EDWARD J. PRINGLE,
SYDNEY L. JOHNSON,	JOHN GARBER.

I think the foregoing opinion is a sound exposition of the law applicable to the choice of Electors.

HENRY H. HAIGHT.

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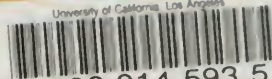
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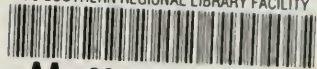
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